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No. 84-621

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

THE KANSAS CITY SOUTHERN RAILWAY COMPANY
and
LOUISIANA & ARKANSAS RAILWAY COMPANY,
*Petitioners,*
v.
THE UNITED STATES OF AMERICA
and
THE INTERSTATE COMMERCE COMMISSION,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## REPLY BRIEF OF PETITIONERS THE KANSAS CITY SOUTHERN RAILWAY COMPANY AND LOUISIANA & ARKANSAS RAILWAY COMPANY

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9

## TABLE OF CONTENTS


| | Page |
|---|---|
| REPLY ARGUMENT | 2 |
| I. | 2 |
| II. | 5 |
| CONCLUSION | 7 |


## TABLE OF AUTHORITIES

CASES


*Baltimore & Ohio R. Co. v. Aberdeen & Rockfish R. Co.*, 393 U.S. 87 (1968) ..... 6

*Burlington Truck Lines v. United States*, 371 U.S. 156 (1962) ..... 6

*Federal Power Commission v. Texaco Inc.*, 417 U.S. 380 (1974) ..... 6


STATUTES AND REGULATIONS


Interstate Commerce Act

49 U.S.C. § 10101a(1) (1982) ..... 3

49 U.S.C. § 11344(c) (Supp. IV 1980) ..... 4

Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (codified as amended in various sections of 49 U.S.C.) ..... 2

Railroad Consolidation Procedures, 366 I.C.C. 75 (1982), 49 C.F.R. § 1180.1 (1983) ..... 4

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Petitioners The Kansas City Southern Railway Company and Louisiana & Arkansas Railway Company (collectively "KCS")[1] file this Reply Brief to address new

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[1] A list of all KCS' parent companies, subsidiaries (other than wholly owned subsidiaries) and affiliates as required by Supreme Court Rule 28.1 appears in KCS' Petition for Writ of Certiorari ("KCS Pet.") at iv-vi. Since the date of filing the Petition, KCS

arguments in the briefs of the Union Pacific Corporation, et al. ("UP")[2] and of the Interstate Commerce Commission and the United States of America (collectively the "Federal Respondents") opposing KCS' Petition for Writ of Certiorari in No. 84-621.

## REPLY ARGUMENT

I. In its Petition for Writ of Certiorari, KCS argued that the policy of the Commission in rail merger proceedings so compromises the policy of Congress in the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (codified as amended in various sections of 49 U.S.C.), that this Court should grant review. Specifically, it is KCS' position that the shift from a century of close administrative regulation to marketplace competition for railroads requires the Commission to take the opportunity afforded by rail merger applications to introduce or augment competition in those cases where the public interest would be materially benefitted. The Commission ruled, however, and the Court of Appeals held, that the Com-

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has become affiliated with PVI, Inc., which has the following subsidiaries:

Bellview Pharmaceutical, Inc.
(previously listed as Bellview Pharmaceutical)
Rockhill Pharmaceutical, Inc.
(previously listed as Rockhill Pharmaceutical)
Olive Pharmaceutical, Inc.
(previously listed as Olive Pharmaceutical)
Stanton Pharmaceutical, Inc.
Spring Pharmaceutical, Inc.
Troost Pharmaceutical, Inc.
Linden Pharmaceutical, Inc.
Martec Pharmaceutical, Inc.
(new Delaware corporation)

The entity listed as Martec Pharmaceutical Inc., KCS Pet. at v, is a Missouri corporation, whose name has now been changed to Midwest Pharmaceutical, Inc.

[2] For rail parties, KCS will use those abbreviations set forth in KCS Pet. at ii.

mission need not even consider increasing competition beyond pre-merger levels, regardless of the public need for increased competition in areas served by the railroads proposing to merge. KCS submits that the Commission's rule cannot be reconciled with the Congressional injunction that competition "to the maximum extent possible" regulate the railroads. 49 U.S.C. § 10101a(1) (1982).

Rather than address the Commission's arbitrary anticompetitive rule, the Federal Respondents charge KCS with proposing an arbitrary procompetitive rule. They say that KCS would require "the imposition of *any* condition that will increase competition." Fed. Resp. Br. at 11-12 (emphasis added). The Federal Respondents have flatly misstated KCS' position. In the proceedings below, both KCS and the Commission understood the legal issue to be whether the Commission should impose procompetitive public interest conditions where there is a showing that: (1) serious anticompetitive circumstances exist which will stunt economic growth if not remedied; and (2) the proposed condition will not unduly burden the merger.[3] Thus, contrary to the contention of the Federal Respondents, the question is not whether the Commission must always accept procompetitive public-interest conditions, but whether it must always reject them.

In this proceeding, the public, acting through the Commission, has granted private railroads antitrust immunity in a deregulated industry enjoying virtually an absolute barrier to entry. KCS urged the Commission to exercise its conditioning power to require UP to accept

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[3] *See* KCS Pet. at 13, 14 (procompetitive public-interest conditions appropriate where "designed to eliminate market dominance" and where they do not "drain away the private benefits of a merger"); *accord* 366 I.C.C. 459, 563 (App. 194a):

> KCS asserts that we should impose conditions on mergers for the purpose of enhancing competition where adequate competition does not exist, if the conditions are feasible and not unduly burdensome on the merging carriers.

some increased competition as the consideration to the public for the enormous private benefits the public conferred on UP.[4] Instead, the Commission adopted a rule which permanently freezes rail competition at pre-merger levels. This Court should resolve the conflict between the Commission's arbitrary rule and Congress' advised procompetitive national rail policy which, insofar as increasing rail competition is concerned, can *only* be given effect in merger proceedings.[5]

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[4] Purportedly quoting KCS at oral argument before the Commission, UP argues that KCS acknowledged seeking conditions for "personal aggrandizement at the expense of [UP]." UP Br. at 4, *quoting* Transcript of ICC Oral Argument, at 180-81. Fully quoted, the transcript shows that KCS' counsel was describing *UP*'s characterization of KCS' position. It ill suits UP in any event to accuse KCS of seeking "personal aggrandizement at the expense of [others]". The Commission found that UP would take nearly $200 million in traffic away from other carriers, 366 I.C.C. at 801 (Attachment 2, total ICC staff estimate) (App. 592a), and made no findings as to over $200 million more that BN and CNW claimed UP would take from them. *Id.* (Attachment 2, second and third line items in protestant estimate). The test is the same, whether parties enjoy private gains from proposed mergers or from proposed merger conditions: are the proposals which create these private gains in the public interest? 49 U.S.C. § 11344(c) (Supp. IV 1980).

[5] The Federal Respondents argue that the Commission's position on procompetitive public-interest conditions is not a new policy, but is "based upon" Commission precedent, including Railroad Consolidation Procedures, 366 I.C.C. 75, 92 (1982), 49 C.F.R. § 1180.1 (1983). In its decision below, the Commission stated that, although it had previously considered conditions to protect "a competing *carrier*", 366 I.C.C. at 562 (App. 193a) (emphasis in original)—*i.e.* private-interest protective conditions—"[o]ur criteria for imposing conditions to protect the public have not been set forth in a similar comprehensive fashion". *Id.* (App. 194a).

The Federal Respondents also accuse KCS of arguing ("wholly without merit") that this rulemaking by adjudication is "impermissible". Fed. Resp. Br. at 14, n.17. KCS' Petition states, however, that rulemaking by adjudication, "*though not impermissible*, re-

II. As an additional ground for granting certiorari, KCS argued that the Court of Appeals' superficial "independent judgment" standard virtually abdicates judicial responsibility to review administrative decisions pursuant to the substantial evidence standard.[6] Because of its cursory review, the Court of Appeals had no idea how the Commission concluded that the merger offered $47 million in public benefits, and indeed selected its own components from among various dollar figures in the Commission's opinion to approximate $47 million. Such confusion by a court of appeals would be inconceivable under the substantial evidence test.

Silent about the Court of Appeals' failure to understand the source of the supposed $47 million in public benefits, the Federal Respondents focus instead on what KCS identified as the most serious arithmetic error committed by the Commission. As KCS pointed out, the Court of Appeals praised the Commission for recognizing a $13.6 million overstatement in equipment utilization. Because of the perfunctory nature of the "independent judgment" standard, however, the Court of Appeals failed to recognize that the Commission neglected to subtract from the $47 million in aggregate public benefits the very $13.6 million overstatement that the Commission itself had specifically held it was necessary to subtract. *See* KCS Pet. at 22-23.

The Federal Respondents' own discussion of this $13.6 million error confirms the dangers of the Court of Ap-

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quires scrutiny on review", KCS Pet. at 16, n. 19 (emphasis added), a standard not observed by the Court of Appeals.

[6] Misquoting KCS' brief below, UP labels KCS' argument concerning the "independent judgment" standard "disingenuous". UP would have this Court believe that KCS lured the Court of Appeals into the casual use of the phrase "independent judgment" so that KCS could seek review of that opinion in this Court. UP Br. at 10, n. 16.

peals' "independent judgment" standard. After a complex series of steps purporting to account for the $13.6 million, the Federal Respondents say that the Commission "[t]hus . . . appropriately took account of the costs of additional equipment in computing the *private* benefits of the merger". Fed. Resp. Br. at 10-11, n.14 (emphasis in original). Of course, even if the Federal Respondents' belated calculations correctly explain how the Commission adjusted UP's *private* benefits,[7] the Court of Appeals thought that it was reviewing a $13.6 million adjustment to *public* benefits.[8] An appellate court employing the substantial evidence test never would have let such a fundamental discrepancy go unexplained.

The Federal Respondents claim that KCS seeks review in this Court of a "wholly factual issue". Fed. Resp. Br. at 10. On the contrary, this Court is not being asked to parse out the extensive arithmetic computations of the Commission, but to declare that the "independent judgment" test applied by the Court of Appeals is not the appropriate standard of review. The issue, thus, is not whether this Court should review facts or second-guess findings, but whether the Commission will be allowed to mask the exercise of unreviewable discretion "in the haze of so-called expertise." *Baltimore & Ohio R. Co. v. Aberdeen & Rockfish R. Co.*, 393 U.S. 87, 92 (1968).

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[7] It is impossible to verify the Federal Respondents' present calculations from the Commission's decision. The Federal Respondents' explanation is nothing more than the *post hoc* rationalization of counsel, which must be rejected by a reviewing court. *See* Federal Power Commission v. Texaco Inc., 417 U.S. 380, 397 (1974); Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962).

[8] The short section of the Court of Appeals' opinion in which it congratulated the Commission for making the $13.6 million adjustment is entitled: "The public benefits". Slip Op. at 22, 736 F.2d 708, 719 (D.C. Cir. 1984) (App. 22a).

## CONCLUSION

For the foregoing reasons and the reasons set forth in KCS' Petition for Writ of Certiorari, this Court should issue a writ of certiorari to the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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